“Good whiskey is not unreasonably dangerous merely because it will make some people
drunk”¹

I. Introduction

Bourbon holds a special place in the heart of America. Recognized as a cheaper
means of transporting rye and corn, whiskey became the preferred drink of soldiers
during the American Revolution, pushing rum aside due to a British blockade of sugar
cane from the Caribbean. The drink became emblematic of freedom from tyranny when a
tax was imposed on whiskey production and stills, prompting the Whiskey Rebellion.
After the rebellion, many distillers from Appalachia moved to Kentucky, where corn
grew in abundance. The distinct grain made for a softer spirit compared to Pennsylvania
rye whiskey, adopting the moniker from the eponymous Old Bourbon, later Bourbon
County, Kentucky.² Bourbon finally became our native spirit in 1964 by being
designated as “a distinctive product of the United States.”³ In the 1980s, Bourbon was
losing ground against other alcoholic beverages due, in part, to grain shortages, until
Maker’s Mark appeared and changed the market. The recent Maker’s and Jose Cuervo

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¹ Restatement (Second) of Torts § 402a, cmt. i (1965).
² Whether the liquors name was adopted from Old Bourbon, or the New Orleans
entertainment district of Bourbon Street is disputed. Though both take their name from
the French Royal House of the 18th Century, whose prince thought the American colonies
important in the struggle for independence. See Laura Kiniry, “Where Bourbon Really
Got Its Name and More Tips on America’s Native Spirit,” Smithsonian.com, June 13,
2013, http://www.smithsonianmag.com/arts-culture/where-bourbon-really-got-its-name-
and-more-tips-on-americas-native-spirit-145879/?no-ist (last visited March 30, 2017).
³ Bourbon Whiskey Designated As Distinctive Product Of U.S., Senate Concurrent
II. Colonial America: The Rise of Whiskey

In colonial America, not only was alcohol prevalent, but it was also thought to “cure the sick, strengthen the weak, enliven the aged, and generally make the world a better place.” In fact, alcohol was thought to be safer than water. While “the New World” had bountiful fresh water, many heedless settlers drank from impure sources, which led to sickness. This led many colonists to drink copious amounts of beer, as their European forebearers did with wine, to steer clear of waterborne diseases. While many laws regarding alcohol prohibited public drunkenness, sumptuary taxes were put in place to reduce overindulgent consumption of hard liquors and duties were placed upon importation of malt to bolster the sale of American grown malt and invigorate brewing beer over the distillation of hard liquor. Colonial America lacked experienced maltsters, those who mill and deal malt, which led to a lack of malt and, consequently, failed to impel the growth of the colonial malt industry. Drinkers of beer, a malted beverage, found prices were rising. As beer prices increased due to the taxes levied upon the imported malt, the distillation of liquor grew—counterintuitive to the purpose of the

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5 Id.
7 Id. at 17.
sumptuary taxes. Distilling grain achieves a greater alcohol content for a similar volume of raw materials.

As the 17th century lapsed, beer ceased being the colonial drink of choice, and rum had taken over. Rum, distilled from sugarcane derived from molasses, had long been produced, but several reasons drove its surge in the colonies. Primarily, rum was economically cheaper to produce. The raw materials were abundant thanks to the sugar trade from the Caribbean Islands, particularly Barbados. Also in rums favor was its higher alcohol content, which preserved the product longer than beer or cider. Higher alcohol content and longer preservation meant that the spirit would be easier to transport.

Rum remained the most consumed alcohol until the American Revolution, when whiskey assumed that distinguished position. Like rum, whiskey became the American drink of choice for a confluence of reasons stemming from the geopolitical climate at the time. As frontiersmen pushed west, indigenous grain, particularly rye, was more plentiful than sugar, and lugging rum became cumbersome. The Scotch-Irish began to immigrate to North America in the 1730s, and they brought with them their love of whisky and

8 Id.
10 Crews, Supra note 4.
12 The spelling of “whiskey” has “engendered passionate debate.” “Whisky” is used in most countries, whereas “Whiskey,” with the “e”, is primarily reserved for American and Irish usage. However, certain American distilleries, like Maker’s Mark, prefer to drop the “e.” Maker's Mark Distillery, Inc. v. Diageo N. Am., 679 F.3d 410 (6th Cir. 2012), See
skill in distillation. When revolution was in the air, the Royal Navy blockaded America seaports, thus cutting off the importation of rum and its main ingredient. In previous wars, the government would supply the soldiers with alcohol. As soldiers in the French and Indian War, soldiers received rum from the British government; the American colonial government began to ration out whiskey for the Continental Army.

### III. America: Unaged

The nascent United States had incurred $45 million in debt to pay for their revolution, and the first Secretary of Treasury, Alexander Hamilton, had to find a way to pay the French back for their loan to the Continental Congress. In 1791, Secretary Hamilton proposed, and Congress enacted, the first federal tax imposed on its citizens “upon spirits distilled within the United States.”

Founding Fathers’ views on alcohol were as varied as their political philosophies, yet most agreed on the importance of alcohol to culture. Hamilton believed ardent spirits caused his fellow Americans to lack restraint, causing imprudence. Understanding that the nation is best fit to collect taxes through imports and exports, and as whiskey was...
drank by most men, Hamilton’s predisposition against spirits led him toward laying a duty upon liquor in hopes that it would generate great revenue for the new nation and “diminish consumption of it, [because] such an effect would be equally favorable to the agriculture, the economy, to the morals, and to the health of the society.”

An excise tax was placed upon the distillers of whiskey and other spirits to pay a varying six to eighteen percent per gallon on the spirit produced. Cash payments of the duty were due to the federal revenue officer in the distiller’s county, with larger distilleries paying a lower tax than the smaller ones. Large commercial distilleries of the northeast had little issue passing the cost of the duty off to consumers. However, the tax is not remembered for those who accepted and paid it. In Appalachia and southwestern Pennsylvania, the tax amounted to four pence, or roughly ten cents, per gallon. However small it may seem, it was viewed as an undue discrimination against these small distillers.

Additionally, the onerous law required each still, the instrument used to distill grain into liquor, to be registered with a federal court. As public houses were sparse and grain was ubiquitous, personal stills were the norm. Roughly 5,000 liquor stills were in operation at the time the excise tax was enacted. Those who failed to register would

18 Id.
20 Id.
22 Hoover, Supra note 19.
23 Thomann, Supra note 6 at 158.
have to pay a tax with their federal court. Unfortunately for those in the mountainous regions of what is now Westmoreland County, the closest federal courthouse was some-300 miles away in Philadelphia—a journey rarely, if ever, made by the frontiersman.\textsuperscript{24} Farmers scoffed at a law as arbitrary as registering a still, or paying a tax for the failure to do so.

> From inception, citizens of the United States were ill-disposed towards centralized government. The basis of the American Revolution was unfair taxation. Farmers believed this to be another elitist tax on the poor, similar to the ones imposed by the British Crown. Many men refused to pay the tax.\textsuperscript{25} Over the two years following the laws passage, the opposition grew from a rumble to a roar and in 1792, as the opposition gained traction in western Pennsylvania, President Washington issued a proclamation condemning the activities that “obstruct[ed] the operation of the laws of the United States for raising revenue upon spirits distilled within the same.”\textsuperscript{26}

The rebellion reached fever pitch when a U.S. Marshal arrived to serve writs against those who failed to pay the tax, and was met by an armed mob.\textsuperscript{27} After the death of a farmer at the hands of the Marshal and a militia of 500 locals outnumbering the federal officers, the sense of urgency to stop the rebellion was palpable.\textsuperscript{28}

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\textsuperscript{26} Hoover, \textit{Supra} note 19.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\end{flushright}
Washington led 13,000 militiamen into western Pennsylvania and arrested 150 rebels in October 1794, quashing the rebellion. 29 This ultimately established, once and for all, that for the new federal governments laws were commands, not suggestions.

During and shortly after the rebellion, many Pennsylvanian farmers fled to Kentucky after hearing of the great whiskey produced in the area, increasing the number of distillers in the new commonwealth. 30 During this period, Thomas Jefferson extended sixty acres to the migrant distillers to “create a permanent structure and crops of native origin.” 31 This area would come to be named Bourbon County. Pennsylvania whiskey relied greatly on rye, giving a more peppery flavor to the whiskey, whereas whiskey made in the Bluegrass State was more delicate due to its “fertile soil and sweet limestone water that were perfect for corn-growing and whiskey-making.” 32 It is here that bourbon whiskey was born.

IV. Bourbon: A Distinct American Product

Prior to statehood, Kentucky had been well established in corn cultivation and distillation. 33 Since independence was declared, Kentucky had pioneered corn due to it the ease of production. 34 And when it was learned that the grain made for a lighter and

29 Id.
32 Regan, Supra note 30.
33 Id.
34 Id.
more “distinctive style of whiskey” compared to Pennsylvania’s rye whiskey, Kentucky whiskey became a mainstay.\textsuperscript{35}

A great amount of lore exists over who was the original creator of bourbon whiskey—most sources point to Baptist minster Elijah Craig.\textsuperscript{36} It is critical to note that, while the standards and procedures of the manufacturing process have acquired the rigidity of statute, the origins of bourbon production were merely a common set of practices driven by environmental realities and crop availability.\textsuperscript{37} According to federal regulations, certain requirements must be met for a spirit to be labeled bourbon. The spirit must be: (1) produced in the United States; (2) made from at least 51% corn; (3) aged in new, charred, American oak barrels; (4) distilled to no more than 160 proof, or 80% alcohol by volume; (5) entered into the barrel at no more than 125 proof, or 62.5% alcohol by volume; and, (6) bottled at 80 proof, 40% alcohol by volume, or more.\textsuperscript{38}

While the barrel maturation process is necessary in the creation of bourbon, there is no minimum aging requirement\textsuperscript{39}, however straight bourbon must be aged for at least two years, and must not include added flavoring or coloring.\textsuperscript{40 41}

\textsuperscript{35 Id.}
\textsuperscript{36 While this is a “fiction agreed upon,” as a matter of fact, Craig never lived in Bourbon County, Kentucky, rather, he lived Georgetown, an area distant from Bourbon County. Gerald Carson, \textit{The Social History of Bourbon: An Unhurried Account of Our Star Spangled American Drink}, 38, The University Press of Kentucky (1963).}
\textsuperscript{37 Jones, \textit{Supra} note 31.}
\textsuperscript{38 27 C.F.R 5.22(b)(1). The Standards of Identity. \textit{(LexisNexis 2017).}}
\textsuperscript{39 For example, Hudson Baby Bourbon, produced by Tuthilltown Spirits in Gardiner, New York, is 100% corn bourbon aged in barrels for only three months. Distiller.com, \textit{Hudson Baby Bourbon}, https://distiller.com/spirits/hudson-baby-bourbon (last visited April 1, 2017).}
\textsuperscript{40 Id.}
\textsuperscript{41 Jack Daniel’s Tennessee Whiskey fails to meet the requirements for bourbon due completely to the “charcoal mellowing” filtration process. The process forces whiskey to filter through maple charcoal, akin to a rapid aging technique. Jack Daniel’s \textit{The Vault-}
There is a common misconception that bourbon must be distilled and aged in Bourbon County or Kentucky to be identified as bourbon, however, this is notably omitted from the federal regulations as a requirement. Rather bourbon must simply be made within the United States. Similar geographic indicators have been attached to such products as Champagne, Tequilla, and Feta. The misconception may have been fostered by products like these, which are used to identify a geographic source, communicate product qualities, and give comparable value.

While international organizations and several European nations have treaties in place to protect geographic indicators, United States law “subsume[s] protection of geographic indications under trademark law… through the categories of ‘certification marks….’ Certification marks are used “to certify regional…origin, material, mode of manufacture, quality, accuracy, and other characteristics…. Thus, for a distillery to hold its spirit out under the certified mark of “bourbon” it must meet standards, but

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45 Id. at 303.


47 Hughes, *Supra* note 42 at 308.

regional origin is not one of those standards. With that in mind, 95% of the world supply of bourbon *does* come from Kentucky.  

In an effort to protect the integrity of the spirit and to claim it as America’s own, the United States Congress passed a resolution in 1964 designating bourbon whiskey as a “distinctive product of the United States….” Congress recognized the standards of identity were promulgated for imported spirits, such as Cognac brandy of France and Scotch whisky of Scotland, and held that bourbon whiskey “must conform to the highest standards and must be manufactured in accordance with the laws and regulations of the United States which prescribe a standard of identity….”

Subsequent international agreements and treaties have recognized bourbon as a distinctive product of the United States, including NAFTA and the US/European Union Distilled Spirits and Spirit Drinks Agreement. Nations have agreed to restrict the sale of bourbon where it fails to meet the proper qualifications, but that has not kept companies from infringing on the trademarks associated with our nations distinctive product.

**V. Maker’s & Trade Marks**

Trademarks are important to any industry, and alcohol should be treated no different. Long before the repeal of Prohibition breweries and distilleries trademarked

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51 *Id.*
52 Many misquote the resolution claiming bourbon as “American’s Native Spirit,” including the very body that drafted and passed the resolution. S.Res.294- 110th Congress (2007-2008). Designating September 2007 as “National Bourbon Month.”
their products. In fact, during Prohibition many organized crime syndicates involved in the liquor trade “put trademarks on the illegal alcohol they manufactured and distributed.”55 Today, with such wide spread commerce, a company must be vigilant in protecting the marks they have invested time and capital in. As was the case for T. William Samuels, Jr., and the small team invested in making sure that Maker’s Mark bourbon would be a success.

The elder Samuels, Bill Sr., was just another son in the line of his forebears who distilled and sold whiskey. After Prohibition, Bill Sr. chose to burn the family recipe for the fiery spirit that “will blow your ears off” and start anew by exploring the importance of the grain, production, and the maturation process within the barrel.56 Bill, Sr. purchased 202 acres of a closed distillery in 1953, essentially hedging his bets that President Eisenhower would not follow suit of his predecessor—shutting down distilleries to save grain.57 Across the Bourbon Trail58, other manufacturers were winding up due to the fear of being forced to shut down.59 Maker’s Mark took advantage of this fear of potential regulations.


57 *Id.*

58 The name “Bourbon Trail” was not formally trademarked until 1999 by the Kentucky Distillers’ Association. It was organized in an effort to “give visitors a firsthand look at the art and science of crafting Bourbon, and to educate them about the rich history and proud tradition of [the] signature spirit.” Kentucky Bourbon Trail, *The Story Behind The Spirit*, http://kybourbontrail.com/history/ (last visited April 11, 2017).

59 Kleinman, *Supra* note 54.
The brand was well received in Kentucky, but it failed to capture the hearts and minds outside the Bourbon Trail. When Bill, Jr. returned from law school, he was— inexplicably, in his mind—put in charge of marketing the product.60

Maker’s continued to grow while the rest of the nation’s bourbon industry declined. The national bourbon industry saw a sales slip by 26% during the 1970s, or roughly 23.7 million case equivalents.61 Maker’s, in comparison, quadrupled its volume to 150,000 cases a year.62 While the family-owned distillery may claim craftsmanship and care for the art are what brought the surprising rise in sales, a large part of the good fortune was due to the strategic use of the paltry $1.2 million advertising budget on “savvy marketing schemes” run by the owner, vice-president, and national sales manager.63

One of those risky campaigns Bill Jr. had was convincing airlines to promote the famous red-wax seal, and prompting those who enjoyed the drink to ask their local liquor store to stock the bourbon—creating a demand for the drink with little cost to expand their marketing jurisdictions.64 During the nadir in national bourbon sales, the strategy proved to be an even greater success when David Garino, a journalist for the Wall Street Journal, tried the whisky65 and wrote a front-page article for the newspaper on the unique

60 Id.
61 David P. Garino, Maker’s Mark goes against the grain to make its mark, Wall Street Journal, August 1, 1980.
62 Id.
64 Id.
65 To make matters more confusing, Maker’s Mark chooses to spell whisky without the traditional American “e” to “pay homage to their Scottish-Irish heritage.” Maker’s Mark (@MakersMark) Twitter (Dec. 14 2012, 8:10 PM)
model that worked, despite contemporaries calling it a “misstep.” Bill Sr., the fourth generation owner, belabored to Garino over the labor-intensive process of handcrafting only 19 barrels of whisky a day at the time. The elder Samuels provided that while the six-year aging process was antiquated, it left their competitors knocking at their door looking to purchase the company.67

The article launched Maker’s Mark into the national spotlight. Maker’s found their niche, and soon struck up a deal with the Wall Street Journal placing advertisements of “desperate fan letters” in which the company responded by simply telling their desirous wannabe-clientele to ask their local liquor store to stock the product.68 The ads initiated a deluge of requests, building a demand that the distillery could barely fulfill, ultimately continuing their decade-long growth into a quarter century and beyond preeminence.69

Notoriety and fortune begets lawsuits, and when Maker’s finally made their mark, that mark became the target of a lawsuit. In 1985, Maker’s applied for and was approved of federal trademark status for the “wax-like coating covering the cap of the bottle and trickling down the neck of the bottle in a freeform irregular pattern.”70 The original trademark notably forgets to mention the color red. In 2003, Maker’s obtained trademark

66 Garino, Supra note 59.
67 Id.
70 MAKER’S MARK, Registration No. 1,370,465.
protection for “the color red as applied to the seal that extends down the neck of the bottle.”

The dripping red wax, brought into the national spotlight from the famous ad campaign of the 1980s, was an icon for the distillery. By the late 2000s, Maker’s Mark sold more than 800,000 cases annually in the United States. Advertising had grown from the slim $1.2 million to an annual budget of $22 million, and the main focus was the irregular dripping red wax.

In 1997, Tequila producer Jose Cuervo commemorated its 200th anniversary by creating the new tequila, Reserva de la Familia. America’s largest tequila manufacturer decided to dip their limited run tequila in red wax. Originally, the high-end tequila bottle design was to include “a straight-edge, non-dripping wax seal capping the bottle, along with a stamp of the Cuervo crest imprinted into the wax and a small blue ribbon extending from underneath the wax.” During production, however, the idea was changed when the rising C.E.O. witnessed the uncut seal with dripping wax, believing it

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71 MAKER’S MARK, Registration No. 2,690,813.
73 Id.
to be an “artisanal look.” From 2001 to 2004, Cuervo sold the Reserva bottle with the dripping red wax in the United States.

_Maker’s Mark_ was fearful that customer confusion would arise from the similarities, and the company initiated a lawsuit against the tequila company’s U.S.-based distributor, Diageo, in 2003 on claims of federal trademark infringement, dilution, and common law trademark infringement and unfair competition under the laws of Kentucky. Trademark infringement exists when a defendant’s use of a mark will likely cause consumer confusion. Contrastingly, instead of focusing on confusion, dilution claims arise where a “senior user’s distinctive and famous mark is being diluted by another’s use of a similar mark that weakens the strength or damages the reputation of the senior mark.” After some time, Cuervo stopped using the dripping wax look and adopted the original straightedge wax seal design. The two parties could not come to settlement, and in 2007 Jose Cuervo was joined in the case.

Narrowing their argument down to asserting the “continuous and regular use” of the color red as the dripping wax seal, instead of the seal itself, regardless of the color, _Maker’s Mark_ asserted that their incontestable mark was merely aesthetic, and not

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76 Id.
78 The Associated Press, _Supra_ note 70.
80 Maker’s Mark Distillery, 703 F.Supp. 2d 671, 697
81 Id.
82 Id.
functional, as the defendants argued.\textsuperscript{83} The United States District Court of the Western District of Kentucky found that the red dripping wax trademark is valid and protected, and \textit{Jose Cuervo}’s similar red dripping wax caused consumer confusion, and thus infringed on the senior mark. However, the court did not find the junior mark diluted the more famous senior mark.\textsuperscript{84}

Regarding functionality, the court held that the \textit{Maker}’s trademark of the dripping wax was a \textit{de facto} functional feature.\textsuperscript{85} \textit{Maker}’s wanted the court to see that the red wax was not functional, and served little purpose aside from brand identification. Achieving this categorical distinction shows that the seals “serve a function... but are not the superior way” to seal the bottle.\textsuperscript{86} The defendants argued that the dripping wax was more akin to “aesthetic functionality,” a legal theory that acknowledges certain marks “would be difficult or costly for competitors to design around.”\textsuperscript{87}

\textit{Cuervo}’s witnesses attempted to persuade the court that the wax seal was the most effective closure method.\textsuperscript{88} The court, however, found that both the wax itself and the color of the wax fail to put other spirit makers at a disadvantage.\textsuperscript{89} Expert witnesses from both sides agreed that there are less expensive means of sealing a bottle than wax, and the dripping method may even take longer than making the edge straight.\textsuperscript{90}

\textsuperscript{83} \textit{Id.} at 684.

\textsuperscript{84} \textit{Id.} at 680.

\textsuperscript{85} \textit{Maker’s Mark Distillery}, 703 F.Supp. 2d 671, 685.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 686.

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Maker’s Mark Distillery}, 703 F.Supp. 2d 671.

\textsuperscript{90} \textit{Id.}
The United States District Court applied the Frisch Test, which measured the likelihood of consumer confusion, and held that the marks are facially similar, and would thus give rise to consumer confusion.\footnote{\textit{Id.} at 697. The United States Sixth Circuit Court of Appeals uses the Frisch factors in determining whether consumers are likely to be confused. The eight-factors are weighed differently depending upon the claim. The factors are: (1) strength of the senior mark; (2) relatedness of the goods and services; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used, (6) likely degree of purchaser care; (7) the intent of defendant in selecting the mark; and (8) likelihood of expansion of the product lines.}

In addition to trademark infringement, Maker’s believed the Reserva bottle constituted dilution under the Trademark Dilution Recovery Act (TDRA).\footnote{\textit{Id.} at 697.} The TDRA finds that a “famous mark that is distinctive, inherently, or through acquired distinctiveness, shall be entitled to an injunction against another person who… commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark.”\footnote{15 U.S.C.S § 1125(c)(1). False designations of origin, false descriptions, and dilution forbidden. (LexisNexis 2017).} Instead of looking towards confusion, dilution seeks to answer whether the senior mark’s reputation is weakened or damaged by the junior mark.\footnote{\textit{Jet, Inc. v. Sewage Aeration Systems}, 165 F.3d 419 (6th Cir. 1998).}

The court found within the first inquiry of a five-part test that Maker’s Mark is not a recognized famous mark, with a 69 percent awareness level among whisky...
drinkers. Without proof of fame, an essential element defined in the TDRA, Maker’s Mark’s dilution claim failed.

Upon appeal to the Sixth Circuit, the appellate court found the district court did not err in its holding.

**VI. Conclusion**

The storied history of bourbon reflects that of the United States. The whiskey was born from our agrarian roots, an innovative amalgamation of our ancestor’s drinks of choice and our own natural resources. Its rise to prominence paralleled our nation’s rise. Soldiers of the American Revolution were warmed by the whiskey supplied by the Continental Army. The American ethos can be captured in the tale of the Whiskey Rebellion Whiskey, where a group of farmers in Pennsylvania protested against a tyranny they recently fought against in hopes of maintaining their nascent heritage. Due to its impact, bourbon whiskey was formally etched into our nation’s laws as a distinct product through congressional recognition. Bourbon’s standard of identity ensures that no other place in the world can claim the distinct liquor as its own. Today, bourbon whiskey is so much part of the culture that trademark’s have become international matters of concern. Intellectual property outside of the bottle is almost as important as the integrity inside the

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95 Maker’s Mark Distillery, 703 F.Supp. 2d 671, 699. The Sixth Circuit Court of Appeals employs a five-part test, which must be satisfied for a plaintiff to succeed on a claim of dilution. To succeed, a plaintiff must prove that (1) its mark is famous, (2) its mark is distinctive, (3) the defendant used the mark in commerce, (4) after it became famous, and (5) the defendant’s use is likely to cause dilution of the plaintiff’s mark.

96 Maker’s Mark Distillery, 703 F.Supp. 2d 671, 705.

bottle. Without room for much argument, it’s true that America’s spirit represents the American spirit.